

THE HONORABLE BENJAMIN SETTLE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CLYDE RAY SPENCER , MATTHEW RAY
SPENCER, and KATHRYN E. TETZ,

Plaintiffs,

v.

FORMER DEPUTY PROSECUTING
ATTORNEY FOR CLARK COUNTY
JAMES M. PETERS, DETECTIVE
SHARON KRAUSE, SERGEANT
MICHAEL DAVIDSON, CLARK COUNTY
PROSECUTOR'S OFFICE, CLARK
COUNTY SHERIFF'S OFFICE, THE
COUNTY OF CLARK and JOHN DOES
ONE THROUGH TEN,

Defendants.

NO. C11 5424 BHS

DEFENDANTS' MOTION TO
STRIKE PLAINTIFFS'
SUPPLEMENTAL DISCLOSURE
PURSUANT TO FED.R.CIV.P.
26(a)(1) AND TO BAR
TESTIMONY

NOTE ON MOTION CALENDAR:
Friday, December 7, 2012

I. INTRODUCTION & RELIEF REQUESTED

Pursuant to Fed.R.Civ.P. 37(c)(1), defendant Sharon Krause, on her own behalf and on behalf of defendants Michael Davidson and James Peters, (collectively "defendants") move for entry of an Order Striking Plaintiffs' Supplemental Disclosure Pursuant to Fed.R.Civ.P. 26(a)(1), and barring all witnesses identified at 1-6 and 10-12 in the Supplemental Disclosure from testifying in writing or in person on motion, at a hearing or at trial.

DEFENDANTS' MOTION TO STRIKE PLAINTIFFS'
SUPPLEMENTAL DISCLOSURE PURSUANT TO
FED.R.CIV.P. 26(a)(1) AND TO BAR TESTIMONY - 1
Cause No: C11-5424 BHS

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II. STATEMENT OF RELEVANT FACTS

Plaintiffs filed this action against defendants in June 2011 seeking substantial damages for alleged false arrest, malicious prosecution and false imprisonment, and for allegedly conspiring to commit these unlawful acts. Document 1. Plaintiffs' Initial Disclosures Pursuant to Fed.R.Civ.P. 26(a)(1) were served in late September, 2011. Declaration of Guy Bogdanovich in Support of Motion to Strike and to Bar Testimony ("Bogdanovich Dec."), ¶ 2 and Exhibit A.

The depositions of defendants Michael Davidson, Sharon Krause and James Peters were noted and taken by counsel for plaintiffs on November 5, 6, and 8, 2012, respectively. Bogdanovich Dec., ¶ 3. Counsel for defendants noted and took the depositions of plaintiffs Clyde Ray Spencer, Matthew Spencer and Kathryn Tetz on November 12, 13, and 14, 2012, respectively. *Id.*

Once clear of the depositions of all parties, counsel for plaintiffs served a supplementation of plaintiffs' prior request for production responses with records Bates No. Spencer005933-005958, via email at 1:37 p.m. on November 19, 2012. Bogdanovich Dec., ¶ 4 and Exhibit B. This supplementation of request for production responses was promptly followed by service of Plaintiffs' Supplemental Disclosure Pursuant to Fed. R. Civ. P. 26(a)(1). Bogdanovich Dec., ¶ 5 and Exhibit C. This Supplemental Disclosure was served via email at 2:14 p.m. on November 19, 2012, the deadline for filing of all motions related to discovery pursuant to the Court's Minute Order Setting Jury Trial and Pretrial Dates and Ordering Mediation. *Id.*; Document 49. Pursuant to the Minute Order, discovery must be completed by December 17, 2012. Document 49.

III. AUTHORITY AND ARGUMENT

Fed.R.Civ.P. 37 provides, in pertinent part:

**DEFENDANTS' MOTION TO STRIKE PLAINTIFFS'
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(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.

(1) Failure to Disclose or Supplement. If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing or at a trial, unless the failure was substantially justified or is harmless.

Fed.R.Civ.P. 26 provides, in pertinent part:

(e) Supplementing Disclosures and Responses.

(1) In General. A party who has made a disclosure under Rule 26(a) . . . must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing [emphasis added].

Here, the records submitted in belated supplementation of plaintiffs' request for production responses date back to 1993, and were generated by Paul Henderson, an investigator communicating with two of plaintiff Clyde Ray Spencer's former criminal defense attorneys, Peter Camiel and Howard Goodfriend. In these records, Mr. Henderson expresses his displeasure at learning that Detective Krause had not been fired or forced to resign from the Clark County Sheriff's Department, and then discloses a dubious "source" of the information he misuses in his zeal to discredit Detective Krause:

(a) Sharon Krause - We'd heard that she was either fired or forced to resign from the department and had gone to work as a cop in a small town. Unfortunately, I learned through a phone call to the sheriff's department that she's still there - working as a detective in the Child Abuse Prevention Center. Nonetheless, my source, Ray Pacheco, a former Clark County deputy sheriff represented by Peter Camiel and myself in a criminal case, tells me that she has a notorious reputation for coercing children into making questionable allegations of sexual abuse. Pacheco says he knows several attorneys who have negative insights into Krause.

Spencer 005941 (emphasis added). The 1993 Henderson reports later list the same four attorneys disclosed only today as witnesses in this case, William Thayer, John Meader, Bob

Yoseph and Mark Muenster. Spencer 005950. These reports also prominently mention a psychiatrist identified in Plaintiffs' Supplemental Disclosure, Lee Coleman, who allegedly possessed records reflecting negatively upon Detective Krause, which Dr. Coleman offered to research "for a fee." Spencer 005958.

Plaintiff Ray Spencer and his attorneys and investigators were in possession of these reports, and knew of the identity of these witnesses, since the mid 1990s, yet they waited until all depositions of parties had been concluded before "supplementing" their "initial" disclosures and request for production responses. Under these circumstances, plaintiffs' supplemental disclosures of these witnesses cannot be said to have been done "in a timely manner," and these individuals should be stricken as witnesses.

In addition to Dr. Coleman, Plaintiffs' Supplemental Disclosure identifies Per Sweetman, M.D., David Ruud, M.D., and Federick Leppien, M.D., all psychiatrists whose knowledge and testimony is described as including diagnoses of plaintiff Clyde Ray Spencer's condition and mental health. To this extent, these witnesses should be regarded as experts, whose identity and opinions should have been disclosed by the expert witness disclosure deadline of October 9, 2012. *See*, Document 49.

IV. CONCLUSION

For the foregoing reasons, defendants request that the court enter an Order striking Plaintiffs' Supplemental Disclosure Pursuant to Fed. R. Civ. P. 26(a)(1), and barring the testimony of all of the above-identified witnesses disclosed therein.¹

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¹ Witnesses 7-9 in the Supplemental Disclosure, Darla R. Schlegel, Lynda Harper and Karen Stone Mignogna, are excluded from this Motion to Strike and the proposed Order.

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2 DATED this 19th day of November, 2012.

3 /s/ Guy Bogdanovich

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